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No. 04-326

In the Supreme Court of the United States

CHARLES E. SWEENEY, JR., PETITIONER

v.

STEVE CARTER, ATTORNEY GENERAL OF INDIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals correctly determine that this Court has not "clearly established" that the right to effective assistance of counsel under the Sixth Amendment as explained in *Strickland v. Washington*, 466 U.S. 668 (1984), extends to the right to counsel at police interrogations under the Fifth Amendment pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966)?

2. Did the court of appeals improperly: a) decide two issues as to which it had not granted a certificate of appealability; and b) deny a certificate of appealability on Sweeney's argument that his statements were improperly admitted at trial because police did not advise him of his *Miranda* rights?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at *Sweeney v. Carter*, 361 F.3d 327 (7th Cir. 2004), *reh'g and reh'g en banc denied*. The order of the district court (Pet. App. A21-A41) is unreported. The opinion of the Indiana Supreme Court on Sweeney's direct appeal (Pet. App. A44-A57) is reported at *Sweeney v. State*, 704 N.E.2d 86 (Ind. 1998), *cert. denied*, 527 U.S. 1035 (1999).

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2004. A petition for rehearing was denied on April 6, 2004. Pet. App. A15-A16. The petition for a writ of certiorari was filed on September 3, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Sweeney, a prisoner currently serving a federal sentence but subject to continued future imprisonment by the State of Indiana, seeks a writ of habeas corpus from his 60-year sentence for his 1995 Clark County, Indiana conviction for murder.

1. The underlying facts

On direct appeal, the Indiana Supreme Court recited the following facts relating to Sweeney's claims:

> On May 28, 1991, the victim, Danny Guthrie, left his family to go fishing with defendant. Guthrie did not return home that evening and his wife assumed that he decided to camp over with defendant. The next morning defendant called to see if Guthrie wanted to check the trout lines. Guthrie's wife informed the defendant that Guthrie never returned home and the defendant told Guthrie's wife that he brought Guthrie home between 4:00 and 6:00 p.m. the previous day. After several unsuccessful attempts to obtain more information from defendant, Guthrie's wife called the police. On May 29, 1991, Detective Kramer, the lead investigator, and other police officers questioned the defendant at his home. However, no arrest was made and Guthrie remained missing.
>
> In February, 1992, defendant was investigated by the Bureau of Alcohol, Tobacco and Firearms for placing a pipe bomb under Detective Kramer's police car. After being charged for these offenses, defendant entered into a plea agreement with the U.S. Attorney's Office on June 26, 1992. Pursuant to the plea agreement, defendant pled guilty to placing the bomb under Kramer's car, agreed to implicate all others involved in the bombing and also to disclose the whereabouts of Guthrie's body and any information relating to the cause of

Guthrie's death. We summarize defendant's story as communicated to federal authorities as follows.

According to defendant, on the return trip from the fishing expedition, defendant agreed to give Guthrie approximately 150 marijuana plants in exchange for a saddle. Immediately after arriving at defendant's home, defendant explained to Guthrie where the marijuana plants were located and provided Guthrie with a shovel, two buckets, and a 9 mm gun for protection. Defendant claimed that he then went to play bingo at the Sellersburg Moose Lodge and did not see Guthrie again that evening. The next day (May 29, 1991), after Guthrie's wife claimed that Guthrie never came home, defendant alleges that he went to look for Guthrie and found him dead with a gunshot wound to the head. He also found the 9mm gun that he had given Guthrie the day before with one round missing and an empty shell casing a foot or two south of Guthrie's body. Because defendant did not want the police to discover the marijuana, he dragged Guthrie's body to a ditch located behind a trailer and buried the body with sweet lime and covered it with dirt and trash. He then threw the shell casings in a creek, and placed one shoe and a pair of sunglasses in the burn barrel by his trailer. Defendant also buried the gun in an ammunition can near his home, but at a later date retrieved the gun and had it in his possession for personal protection. Defendant told the authorities that eventually the gun was seized from him in the State of Utah as a result of a routine traffic violation. At all times, defendant proclaimed his innocence.

On July 1, 1992, the police obtained a search warrant for defendant's property and located Guthrie's body in the area described by defendant. An autopsy was performed on the body on July 2,

> 1992, and the medical examiner positively identified the body as that of Daniel Guthrie. The examiner also retrieved the bullet that caused Guthrie's death. The bullet and the 9mm gun that was confiscated from defendant by a Utah police officer was sent to the Bureau of Alcohol, Tobacco and Firearm Laboratory. The Bureau confirmed that the bullet that killed Guthrie had been fired from the 9mm gun belonging to the defendant.

Pet. App. A45-A47 (footnotes omitted). Further, the Indiana Supreme Court recited additional facts surrounding Sweeney's giving his statement to federal authorities as follows:

> [F]ederal officials offered defendant a plea agreement whereby they would recommend a sentence reduction if defendant would provide the federal officials with certain kinds of information, the most relevant to this case being the location of Danny Guthrie's body. After this proposal was made, defendant's attorneys telephoned the Clark County prosecutor to advise the prosecutor of the agreement which had been offered by the federal officials, and asked if the prosecutor would give the defendant "use immunity" for any statements which were provided. What happened next is disputed. Defense counsel testified that, based on the fifteen minute telephone conversation, it was absolutely clear that a use immunity agreement existed. One of the attorneys advised defendant that any statements he made regarding the whereabouts of Guthrie's body could not be used against him in a criminal prosecution. Defendant then provided federal officials and a Clark County detective with his recollection of the events leading up to Guthrie's death.

Pet. App. A49-A50 (footnote omitted).

2. The state court proceedings

The State of Indiana charged Sweeney with Guthrie's murder. A jury found Sweeney guilty and the state trial court sentenced Sweeney to 60 years imprisonment to be served upon the completion of his federal sentence of 210 months. Pet. App. A47-A48.

On direct appeal, Sweeney argued, in pertinent part, that: 1) his statement to federal authorities should have been suppressed because it was given absent *Miranda* warnings; 2) his statement should have been suppressed because it was given pursuant to a use immunity agreement with state prosecutors; and 3) his counsel rendered ineffective assistance of counsel in the state case by erroneously advising Sweeney during the federal case plea bargain negotiation that a use immunity agreement with state prosecutors had been reached.

The Indiana Supreme Court rejected these arguments and affirmed Sweeney's conviction. Specifically, the state supreme court held, respectively, that: 1) Sweeney had received the equivalent of *Miranda* warnings by having two attorneys present during the federal case plea bargain negotiation who advised Sweeney of his rights and told investigators that they had done so; 2) no use immunity agreement existed between Sweeney and state prosecutors; and 3) Sweeney had no right to the effective assistance of counsel in the state case under the Sixth Amendment before any state charges were filed. Pet. App. A50-A56.

Sweeney filed a petition for a writ of certiorari in this Court. This Court denied the petition. *Sweeney v. Indiana*, 527 U.S. 1035 (1999) (order) (No. 98-1462).

3. The federal habeas corpus proceedings

Sweeney filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Indiana. Among other claims, Sweeney argued that: 1) his statement should have been suppressed given the absence of *Miranda*

warnings; 2) his statement was involuntarily given; and 3) he received the ineffective assistance of counsel because his attorneys erroneously advised him during the federal case plea bargain negotiation regarding use immunity in state court. The district court denied the petition, finding that the Indiana Supreme Court's adjudication of these claims were neither contrary to or involved an objectively unreasonable application of clearly established federal law. Pet. App. A30-A36, A39-A40. The district court denied a certificate of appealability (COA). Pet. App. A42.

The United States Court of Appeals for the Seventh Circuit granted a COA as to Sweeney's ineffective assistance of counsel claim. Pet. App. A17-A18. The court of appeals denied his motion to reconsider its inherent denial of a COA on his *Miranda* and voluntariness claims. Pet. App. A19. Sweeney sought a writ of certiorari in this Court requesting review of the inherent denial of a COA on his *Miranda* and voluntariness claims, which this Court denied. *Sweeney v. Carter*, 538 U.S. 922 (2003) (order) (No. 02-2165).

The court of appeals later affirmed the denial of Sweeney's habeas petition. Pet. App. A1-A14. Sweeney's argument on appeal was that he was denied a right to effective assistance of counsel under the Fifth Amendment. Pet. App. A2. The court of appeals rejected the State's argument that Sweeney had committed procedural default by relying solely on the Sixth Amendment in his arguments to the state supreme court and failing to assert his Fifth Amendment counsel claim. Pet. App. A8-A11. However, the court of appeals held that because this Court has never clearly established a right to effective assistance of counsel before the initiation of a criminal proceeding, the Indiana Supreme Court's adjudication of the counsel claim was neither contrary to nor involved an unreasonable application of clearly established federal law necessitating relief. Pet. App. A11-A14. The court of appeals also discussed—and rejected—Sweeney's corollary arguments regarding

Miranda rights and voluntariness of the statement. Pet. App. A5-A8. The court of appeals denied Sweeney's petition for rehearing and rehearing *en banc*. Pet. App. A15-A16.

ARGUMENT

I.

The court of appeals properly rejected Sweeney's claim under the Fifth Amendment of ineffective assistance of counsel at a pre-charge plea negotiation.

This Court should deny Sweeney's petition for a writ of certiorari because the court of appeals properly adjudicated his Fifth Amendment ineffective assistance of counsel claim. First, Sweeney's claim is barred by procedural default. Second, Sweeney's proposed rule is not "clearly established" under the meaning of 28 U.S.C. § 2254(d)(1). The petition should be denied.

A.

Sweeney's ineffective assistance of counsel claim is barred by procedural default for failing to present his current argument to the Indiana Supreme Court.

Sweeney's argument to the Indiana Supreme Court regarding the effectiveness of his counsel never referenced, let alone relied upon, a Fifth Amendment basis for the claim. Indeed, Sweeny limited his argument at that time to the Sixth Amendment and the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). Opp. App. 1a-2a. This failure results in a procedural default on federal habeas review. *Baldwin v. Reese*, 541 U.S. ___, 124 S. Ct. 1347, 1351 (2004).

The court of appeals erred in concluding that although Sweeney did not tell the state courts that he believed that counsel's acts violated the Fifth Amendment, his reference to the Sixth Amendment was sufficient to preserve the Fifth Amendment argument for federal

habeas. Pet. App. A8-A9. This is in part because the court of appeals found that Sweeney "explicitly relied on a range of federal cases that engage in constitutional analysis of the right to effective assistance of counsel." Pet. App. A9. The court of appeals believed this despite the plain language of Sweeney's principal brief to the Indiana Supreme Court[1] that cited only *Strickland* and not a "range of federal cases." Opp. App. 1a-2a. The conclusion to his argument explicitly stated that he was entitled to relief under *Strickland*. Opp. App. 2a. In the court of appeals' belief, Sweeney was not required to make the same legal argument in both state and federal courts because the factual basis for the two claims are the same. Pet. App. A10. This logic was rejected last term in *Baldwin*.

Baldwin held that a habeas petitioner commits procedural default when he does not explicitly tell the state's highest court the federal basis for a claim. *Baldwin*, 124 S. Ct. at 1351. In that case, the habeas petitioner only alleged "ineffective assistance of counsel" in his brief to the Oregon Supreme Court but did not cite any federal basis for the claim. *Id.* at 1350. *Baldwin* was decided after the court of appeals decided this case.

The State recognizes that Sweeney did at least cite a federal basis for his counsel claim, but that does not solve the problem here. Sweeney's entire argument in his principle direct appeal brief (Opp. App. 1a-2a) was based on *Strickland* and the Sixth Amendment, which, as the Indiana Supreme Court (and even the court of appeals) observed, requires first that a criminal proceeding be initiated. Sweeney did not address the counsel claim in his direct appeal reply brief. Now, Sweeney admits that the Sixth Amendment does not apply here but instead the state courts should have found a violation of the Fifth

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[1] Sweeney's direct appeal was taken directly to the Indiana Supreme Court who, at that time, had sole jurisdiction over the appeal because Sweeney's sentence was in excess of 50 years. Ind. Const. Art. 7, § 4 (1996).

Amendment (which, so the argument goes, does not require the initiation of a criminal proceeding). But nowhere did Sweeney alert the Indiana Supreme Court that it should analyze his claim in such a manner. This "bait and switch" is exactly the problem that *Baldwin* and the fair presentment requirement intend to prevent.

If a defendant believes that he is entitled to federal habeas relief under one legal theory but explicitly limited his arguments to the state courts to a different theory, his habeas claim is forfeited. The principles of comity and federalism that underlie the exhaustion and procedural default rules logically require no less. *Id.* at 1349. Sweeney has violated those principles and habeas review should be barred. This Court should deny the petition.

B.

This Court has not clearly established a Fifth Amendment right to effective assistance of counsel prior to the initiation of a criminal proceeding.

Sweeney's procedural default notwithstanding, the court of appeals properly denied habeas relief on the merits because this Court has not "clearly established" the principle upon which he now relies: that the Fifth Amendment requires that counsel provided during a custodial interrogation must render effective assistance or the evidence obtained pursuant to the interrogation is inadmissible at a later trial. Whether such a rule is wise or otherwise desirable is beside the point; Sweeney is not entitled to habeas relief because 28 U.S.C. § 2254(d) precludes relief unless the state courts' adjudication was contrary to or involved an unreasonable application of clearly established federal law as determined by this Court. *Williams v. Taylor*, 529 U.S. 362, 402-03 (2000).

This Court has not discussed the meaning of the "clearly established" requirement. Still, all of the circuits are in agreement that at the very least this Court must have explicitly found a right to exist. *See* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice*

and Procedure § 32.3 n.10 (4th Ed. 2001 & Supp. 2003) (hereinafter "Hertz & Liebman") (compiling cases). *See also Early v. Packer*, 537 U.S. 3, 10 (2002) (per curiam) (court of appeals erred in granting habeas relief on ground that state court decision was contrary to Supreme Court decisions that were only based on the Court's supervisory power over the federal courts and did not establish constitutional rights). Congress must have intended "clearly established" to mean something more than "potential," "possible," or even "suggested."

"Clearly" has been defined as "without doubt or question" and "establish" has been defined as "to settle or fix after consideration." Webster's Third New International Dictionary Unabridged (1993). Professors Hertz and Liebman have noted that Congress intended the clearly established requirement to keep federal courts from invalidating state decisions based on rules of recent creation that did not exist at the time of the state court adjudication. Hertz & Liebman, § 32.3 n.11 (quoting portions of the Congressional Record).

Whatever the precise contours of the "clearly established" requirement, Sweeney's proposed rule has not been so defined. If this Court had done so, Sweeney (and the state and federal courts) could have easily pointed to such a rule and considered Sweeney's argument in light of that law. While Sweeney provides an argument for creating a right to the effective assistance of counsel at pre-charge interrogations, he does not point to any clearly established rule. Sweeney's own argument belies his assertion that the legal basis for his claim is clearly established: "It must be conceded that there is no decision of this Court specifically addressing an ineffective assistance of counsel claim in the Fifth Amendment context." Pet. 10.

The State agrees with the court of appeals on this point:

> While [Sweeney] was fully entitled to ask the Indiana Supreme Court to apply a *Strickland*-like

> standard to his claim, that court was obliged to do so only if existing U.S. Supreme Court precedent clearly established such a rule. Here, it is clear that the Supreme Court has not taken the step that Sweeney needs. Indeed, as far as we can tell, the Supreme Court has not mentioned effective assistance of counsel (in the *Strickland* sense) and the Fifth Amendment in the same breath, let alone set forth a clearly established right to that effect. To the contrary, the Court has been at pains in the Sixth Amendment context to note that the right to counsel attaches only at the initiation of adversary criminal proceedings, and not before. From there, it is a short step to the conclusion that the Indiana Supreme Court's decision cannot be called "contrary to" or "an unreasonable application of" a decision of the United States Supreme Court.

Pet. App. A11-A12. Not only is Sweeney's proposed rule not clearly established, but the Indiana Supreme Court cannot be said to have been objectively unreasonable for failing to invent such a right. The lower federal courts properly denied Sweeny's petition for a writ of habeas corpus.

Even if this Court were inclined to establish such a rule, it would be inappropriate to do so here where it could not retroactively provide a basis for habeas relief. *Teague v. Lane*, 489 U.S. 288, 315-16 (1989). This Court should decline invitations like Sweeney's until a case on direct appeal provides an appropriate opportunity. Sweeney's petition should be denied.

II.
The court of appeals properly addressed Sweeney's other arguments surrounding the admissibility of his statement to authorities.

This Court should deny the petition for a writ of certiorari because the court of appeals properly discussed Sweeney's additional arguments that go to the

admissibility of his statement. Sweeney invited the court of appeals to address these issues in his brief, so he cannot be heard to complain that it actually discussed them in its opinion. Furthermore, no reasonable jurists could debate that the district court correctly denied habeas relief on Sweeney's *Miranda* argument. The petition should be denied.

A.
The court of appeals did not deprive Sweeney of due process by discussing his arguments that were corollary to his counsel argument.

To the extent that the court of appeals discussed the merits of Sweeney's *Miranda* and voluntariness of his statement claims, it was only because Sweeney's brief to the court of appeals repeatedly made those arguments. The court of appeals prefaced its discussion, "Although other parts of Sweeney's brief touch upon the *Miranda* and due process claims, it is not clear whether he is trying to pursue those theories independently, or if he instead is mentioning them only in support of his ineffective assistance claim." Pet. App. A6. Thus, the court of appeals briefly considered Sweeney's argument in a thorough attempt to avoid Sweeney complaining to this Court that his arguments were not fully considered. Now Sweeney claims that he should have been able to brief those claims more fully. Sweeney cannot, as the saying goes, have his cake and eat it too.

Sweeney has no right in due process jurisprudence to any particular quality of briefing in federal habeas proceedings. The court of appeals has explained that a habeas petitioner may brief claims that are in addition to those specified in a COA if he wants the court to consider expanding the COA.[2] *Porter v. Gramley*, 112 F.3d 1308,

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[2] This is in large part because, in the Seventh Circuit, the judges on the panel that decides an appeal are not necessarily the same judges on the motions panel who considered the request for the COA. Seventh

1312 (7th Cir. 1997). It was reasonable for the court of appeals to question Sweeney's motive for arguing the additional issues, especially in light of his extensive pervious efforts to expand the COA. The solution, therefore, was to briefly discuss those arguments and explain why Sweeney was not entitled to any relief based upon them. The court of appeals did not err in choosing to indulge, however briefly, Sweeney's apparent invitation to consider those claims. This Court should deny the petition.

B.

The court of appeals properly denied a certificate of appealability on Sweeney's *Miranda* claim.

Sweeney was not entitled to a COA on his *Miranda* claim. To obtain a COA, the habeas petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). To do so, the habeas petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2001) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Sweeney has not met his burden.

First, Sweeney has already unsuccessfully sought a writ of certiorari on this issue and as such, this argument should be deemed *res judicata*. *Sweeney*, 538 U.S. 922 (2003) (order) (No. 02-2165). Sweeney argues (Pet. 20 n.5) that *Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256 (2004), requires COA applicants to wait until after complete consideration of the appeal by the court of appeals before seeking a writ of certiorari on the COA expansion question. *Banks* does not stand for that proposition. The Fifth Circuit in *Banks* followed the same procedure it

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Circuit Operating Procedures 1(a)(1), http://www.ca7.uscourts.gov/Rules/rules.htm#opproc1 (last accessed October 20, 2004).

used in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), where it made the COA determination at the same time it issued a decision on the merits. *Banks*, 124 S. Ct. at 1270-71. Thus, Banks sought certiorari review of the COA determination at the first available opportunity and this Court determined that a COA should have issued. *Id.* at 1280. Here, however, Sweeney has already requested certiorari review on this question and this Court denied the petition. This Court should not consider this argument a second time. To do so would just encourage a waste of judicial resources below.

Sweeney begins his argument (Pet. 16-21) by discussing why the court of appeals is wrong to not consider the issuance of a COA as a jurisdictional prerequisite. It is true that this Court in *Miller-El* stated that a COA is jurisdictional. *Miller-El*, 537 U.S. at 335-36. The State agrees with Sweeney that the line of cases in the Seventh Circuit that disagree have been abrogated by *Miller-El*. However, that is not the question here. The only question is whether the court of appeals should have issued a COA on Sweeney's *Miranda* claim.

The court of appeals' brief discussion of the *Miranda* claim shows that no jurists of reason would find the district courts' denial of this claim to be debatable or wrong. Although the court of appeals disagreed with the district court and the Indiana Supreme Court over the applicability of the "effective equivalent" exception to the requirement that police give *Miranda* advisements, "[t]he record here shows unequivocally that Sweeney knowingly and voluntarily waived his *Miranda* rights." Pet. App. A6-A7. Law enforcement did not initiate the questioning here and nor was it a typical interrogation in a coercive environment. Sweeney was accompanied by two attorneys who had brokered a deal with federal prosecutors that he would give a statement in exchange for a favorable sentencing recommendation. Pet. App. A7, A51. As the Indiana Supreme Court observed, the federal law enforcement agents to whom Sweeney made his

statement did not give the *Miranda* advisements only because Sweeney's counsel told them that they had done so. Pet. App. A51 n.33. Sweeney and his attorneys knew of his *Miranda* rights and Sweeney purposefully, knowingly, and voluntarily waived those rights in order to benefit from the plea agreement. Sweeney's statement was not given in the sort of coercive environment that *Miranda* advisements discourage. *See Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987) (noting that the purpose of *Miranda* was "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment").

Whether a defendant waived his rights is evaluated under the totality of the circumstances and can be inferred by a course of conduct that reflects a desire to give up his rights. *Fare v. Michael C.*, 442 U.S. 707, 724 (1979). Sweeney was counting on his statement being knowing, intelligent, and voluntary so he could obtain the benefits of the plea agreement. Sweeney's desire for a use immunity agreement before talking to authorities belies his claim that he didn't fully know that his statements could be used against him. *Miranda* does not require law enforcement to warn suspects of the consequences of bad advice from counsel. Sweeney knowingly, intelligently, and voluntarily waived his *Miranda* rights because doing so was the only way to reap the benefits of a plea agreement.

Moreover, any error in the admission of Sweeney's statement to federal officials was harmless. A habeas petitioner cannot obtain a writ of habeas corpus unless he can show that the state court's error "had a substantial and injurious effect or influence on the jury's verdict."[3] *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993). The "fruit of the poisonous tree" doctrine has not been applied by this Court to exclude other evidence obtained from

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[3] Sweeney does not even attempt to show that any error was not harmless despite his burden to do so.

information gleaned from statements obtained in violation of *Miranda*. Sweeney's statement was not a confession as he maintained his innocence throughout. But, Sweeney was the last person to be seen with the victim, the victim was buried on Sweeney's property, and had been shot with Sweeney's gun (which was later confiscated from Sweeney by Utah police in an unrelated incident). If anything, Sweeney's statement was testimony that attempted to explain away the circumstantial evidence against him. The jury may have chose to disbelieve his story, but Sweeney cannot show that his statement has a substantial and injurious effect on the verdict.

The court of appeals properly denied a COA on Sweeney's *Miranda* claim. No reasonable jurist could debate that the district court erred in rejecting Sweeney's argument. This Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2004

APPENDIX A

IN THE INDIANA SUPREME COURT
CAUSE NO. 10S00-9603-CR-00231

CHARLES EDWARD SWEENEY, JR.
Appellant (Defendant Below)
VS.
STATE OF INDIANA
Appellee (Plaintiff Below)

APPEAL FROM THE CLARK CIRCUIT COURT
THE HONORABLE DANIEL F. DONAHUE, JUDGE

BRIEF OF APPELLANT

* * *

IV. SWEENEY'S STATEMENT REGARDING THE LOCATION OF GUTHRIE'S BODY SHOULD BE SUPPRESSED.

* * *

C. SWEENEY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Alternatively, Sweeney was denied effective assistance of counsel when his attorney allowed him to make a statement regarding the location of Guthrie's body while under the impression Sweeney had been granted "use immunity" in the murder investigation. (R. p. 611).

McDaniel's and Sedwick's allowing Sweeney to give the statement regarding Guthrie's body, without first obtaining a writing or recording of the grant of "use immunity", was an unreasonable decision denying Sweeney effective assistance of counsel. Indeed, in Indiana, use immunity cannot even be granted by the Prosecutor, but only by the Court. IND. CODE ANN. 35-37-3-3(a) (West 1981).

To succeed on a 6th Amendment claim of ineffective assistance of counsel, one must satisfy the performance-

prejudice standard set forth in Strickland v. Washington, (1984), 466 U.S. 668, 104 S.Ct. 2052, 86 L.Ed.2d 674. The performance component requires the appellant to show that counsel's performance was deficient. The standard is reasonably effective assistance, which is objectively measured by prevailing professional norms. The prejudice component requires one to show that counsel's unreasonable performance not only prejudiced the defense, but also that this prejudice undermined the reliability and fairness of the proceeding. Stanley v. State, (1985) Ind., [4]79 N.E.2d 1315, 1317.

Both components are met in this case. The conduct of Sweeney's attorneys was deficient and that deficiency greatly prejudiced the defense. It was unreasonable for McDaniel and Sedwick to convey the impression that an immunity agreement had been reached when there was nothing reduced to writing, there was no recording showing that any agreement existed between the defense and the State and no request had been made of the trial court for immunity. Sweeney was unable to make an "informed decision" to give his statement because of his attorney's faulty representations regarding his immunity. Having attorneys who allow and encourage one to give self-incriminating statement in a murder investigation without first obtaining a recording of the use immunity agreement approved by the court is tantamount to having no attorney at all. Allowing the statement to be made denied Sweeney's right to a fair trial because without the statement, there was not enough evidence to prosecute Sweeney, much less convict him. In fact, McDaniel was not concerned about the possibility of the murder charge. (R. p. 711). He was also told that Sweeney could have given the body's location through his attorney without giving a statement, but McDaniel encouraged Sweeney to cooperate. (R. p. 611, 614). Sweeney is entitled to relief under Strickland and the 6th Amendment to the United States Constitution for ineffective assistance of counsel.